

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

First Named Inventor:	:	
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Conf. No.: 7133	:	Group Art Unit: 2457
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Appln. No.: 10/078,815	:	Examiner: Avi M. Gold
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Filing Date: February 19, 2002	:	Attorney Docket No.: 10397-3U1
	:	
Title:	:	
	:	SYSTEM AND METHOD FOR DETERMINING NETWORK
	:	CONFIGURATION SETTINGS THAT PROVIDE OPTIMAL NETWORK
	:	PERFORMANCE

**STATEMENT OF SUBSTANCE OF EXAMINER INTERVIEW**

Applicants wish to thank Examiner Gold for extending the courtesy of a personal interview with Applicants' undersigned representative and joint inventor Adam Schran (attending via telephone) on February 18, 2010. During the interview, the contents of the previously filed "Amendment Under 37 CFR § 1.111" (Amendment) was discussed.

Agreement was reached that the 35 U.S.C. 101 rejection would be withdrawn.

Regarding the arguments presented for traversal of the prior art rejection, agreement was not reached regarding whether the revised "Declaration of Prior Invention..." adequately highlights where steps (c) and (e) of the independent claims are disclosed in Exhibit 1. Agreement was also not reached regarding whether the substantive arguments traversing the prior rejection are persuasive. The Examiner has not yet fully reviewed these issues and will make a determination on these issues shortly. The following comments summarize points of argument made during the interview regarding these issues. It is respectfully requested that these arguments be considered before a final determination is made on these issues.

**i. Disclosure of steps (c) and (e) of the independent claims in Exhibit 1 of the "Declaration of Prior Invention..."**

Referring to pages 16-17 of the Amendment, the excerpted text portion of Exhibit 1 which refers to a "series of connectivity tests" performed with a "variety of network setting configurations" was highlighted and it was emphasized that an artisan would understand that

these phrases, when understood in light of the other highlighted portions of Exhibit 1 in Exhibit 4 of the Declaration, means that a plurality of groups of network configuration settings are tested. More specifically, it was discussed at the interview that these phrases would be understood by an artisan to have the following meaning:

a variety of network setting configurations

a first network setting configuration:       $P_{1_1} P_{2_1} P_{3_1} \dots$  (P=parameter)

a second network setting configuration:       $P_{1_2} P_{2_2} P_{3_2} \dots$

a series of connectivity tests

a first connectivity test:      Use  $P_{1_1} P_{2_1} P_{3_1} \dots$

a second connectivity test:      Use  $P_{1_2} P_{2_2} P_{3_2} \dots$

Thus, a “series of connectivity tests” performed with a “variety of network setting configurations” means that a plurality of groups of network configuration settings are tested.

## **ii. Substantive arguments traversing outstanding rejection**

Applicants emphasized their position discussed on pages 17 and 22-23 of the Amendment that column 10, lines 15-24 of Claessens states that a system administrator selects one of the plurality of test configuration identifiers, which, in turn, causes a network to be configured based on network-related parameters associated with that identifier. Nowhere does Claessens disclose or suggest that the plurality of test configurations in Claessens are provided for the purpose of selecting a particular configuration that optimizes performance of the network.

Applicants further emphasized that the use of Rehkopf to provide the missing disclosure in Claessens of exemplary steps (e) and (f) of claim 7 of automatically repeating different test settings for a plurality of different test configurations is improper for at least the following reasons:

1. Rehkopf discloses a testing process wherein one floating variable at a time is changed, as discussed on page 18 of the Amendment. Rehkopf does not disclose a testing process that automatically selects a different set (group) of test parameters for each testing cycle. It is improper to import Rehkopf's concept of automatically repeating different test settings, while ignoring the actual manner in which Rehkopf operates. That is, if Rehkopf's testing process is to be combined with Claessens, then Rehkopf's testing process must be used within Claessens as it is described in Rehkopf, and not modified to match Applicants' claimed testing process. Modifying Rehkopf's concept of automatically repeating different test settings to match Applicants' claimed testing process wherein a plurality of groups of network configuration settings are tested is improper hindsight reconstruction of Applicants' invention.

2. There is no reason to modify Claessens to repeatedly select different test configuration identifiers in Claessens and thereby automatically conduct network performance tests on the network using different sets of network-related parameters. As discussed above, Claessens discloses that a system administrator selects one of the plurality of test configuration identifiers, which, in turn, causes a network to be configured based on network-related parameters associated with that identifier. Claessens does not discuss that there is any reason or need to select an optimum identifier (i.e., an optimum set of network-related parameters), or that the system administrator should try different identifiers for any reason whatsoever. Again, it is improper hindsight reconstruction of Applicants' invention to fabricate a need to even provide for repeatedly selecting different test configuration identifiers in Claessens, which would thereby lay the foundation for importing Rehkopf's concept of automatically repeating different test settings into Claessens.

3. The Examiner's proposed modification to Claessens to repeatedly select different test configuration identifiers in Claessens, and thereby automatically conduct network performance tests on the network using different sets of network-related parameters, fails the "obvious to try" test sanctioned by *KSR Int'l v. Teleflex Inc.*, 127 S. Ct. 1727 (2007), hereafter, "KSR".

According to KSR,

"When there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely the

product not of innovation but of ordinary skill and common sense. In that instance the fact that a combination was obvious to try might show that it was obvious under §103.” (emphasis added).

Thus, the fact that something was “obvious to try” might be sufficient to prove obviousness when:

- i. a design need or market pressure to solve a problem existed; and
- ii. there was a finite number of identified predictable solutions; and
- iii. the success anticipated by trying such solutions was realized.

Here, the Examiner has failed to identify the existence of any design need or market pressure to solve a problem. The Examiner’s rationale for the combination rejection is simply that “The different groups of configuration settings are found in Claessens, while the repetition of testing settings is found in Rehkopf.” This rationale does not identify any design need or market pressure to solve a problem that would have led an artisan to modify Claessens with the repetition of testing settings found in Rehkopf. Thus, the Examiner’s proposed modification to Claessens is a textbook example of improper hindsight modification of a reference to build Applicants’ invention.

4. Applicants further emphasized that Claessens is not relevant to the claimed invention since it is used for network performance testing, and not for optimizing network configuration settings for a user’s client machine by adjusting network configuration settings of a user’s client machine.

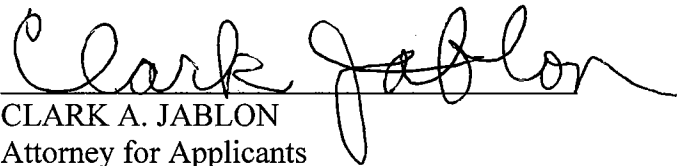
Withdrawal of the outstanding rejection, and allowance of the pending claims, is respectfully requested for at least the reasons discussed in the previously filed Amendment and the additional discussion given above.

Respectfully submitted,

Adam R. Schran et al.

February 22, 2010  
(Date)

By:



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